

Karma M. Giulianelli (SBN 184175)
BARTLIT BECK LLP
1801 Wewatta St., Suite 1200
Denver, CO 80202
Telephone: (303) 592-3100
Facsimile: (303) 592-3140
karma.giulianelli@bartlitbeck.com

Hae Sung Nam (*pro hac vice*)
KAPLAN FOX & KILSHEIMER LLP
850 Third Avenue
New York, NY 10022
Telephone: (212) 687-1980
Facsimile: (212) 687-7715
hnam@kaplanfox.com

Co-Lead Counsel for the Proposed Class

[Additional Counsel on Signature Page]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

**IN RE GOOGLE PLAY CONSUMER
ANTITRUST LITIGATION**

RELATED ACTIONS:

Epic Games Inc. v. Google LLC et al.,
Case No. 3:20-cv-05671-JD

*In re Google Play Developer Antitrust
Litigation*, Case No. 3:20-cv-05792-JD

State of Utah, et. al., v. Google LLC, et. al.,
Case No. 3:21-cv-05227-JD

No. 3:20-CV-05761-JD

**CONSUMER PLAINTIFFS' MOTION
FOR LEAVE TO AMEND PURSUANT
TO FEDERAL RULES OF CIVIL
PROCEDURE 15(A)(2) AND 21**

Date: December 9, 2021

Time: 10:00 a.m.

Courtroom: Courtroom 11, 19th Floor

Judge: Hon. James Donato

NOTICE OF MOTION AND MOTION

PLEASE TAKE NOTICE that on December 9, 2021 at 10:00 a.m., or as soon thereafter as the matter can be heard by the above-titled court, in the courtroom of the Honorable James Donato located at the Phillip Burton Federal Building and United States Courthouse, Courtroom 11, 19th Floor, 450 Golden Gate Avenue, San Francisco, CA 94102, Consumer Plaintiffs will move the Court, pursuant to Federal Rules of Civil Procedure 15 and/or 21, for an order permitting Consumer Plaintiffs to amend their consolidated complaint to add Alex Iwamoto and Leigh Silver as plaintiffs and putative class representatives, and to update certain allegations concerning the relevant markets. Consumer Plaintiffs' Motion is based on this Notice and Motion, the Memorandum of Points and Authorities in Support of Motion, the complete records and files of this action, all other matters of which the Court may take judicial notice, and any other such evidence and oral argument as may be made at the hearing of this matter.

Respectfully submitted,

By: /s/ Karma M. Giulianelli

By: /s/ Hae Sung Nam

BARTLIT BECK LLP

Karma M. Giulianelli (SBN 184175)
Glen E. Summers (SBN 176402)
Jameson R. Jones (*pro hac vice*)
1801 Wewatta St., Suite 1200
Denver, CO 80202
Telephone: (303) 592-3100
Facsimile: (303) 592-3140
karma.giulianelli@bartlitbeck.com
glen.summers@bartlitbeck.com
jameson.jones@bartlitbeck.com

John Byars (*pro hac vice*)
Lee Mason (*pro hac vice*)
54 W. Hubbard St., Suite 300
Chicago, IL 60654
Telephone: (312) 494-4400
Facsimile: (312) 494-4440
john.byars@bartlitbeck.com
lee.mason@bartlitbeck.com

KAPLAN FOX & KILSHEIMER LLP

Hae Sung Nam (*pro hac vice*)
Robert N. Kaplan (*pro hac vice*)
Frederic S. Fox (*pro hac vice*)
Donald R. Hall (*pro hac vice*)
Aaron L. Schwartz (*pro hac vice*)
850 Third Avenue
New York, NY 10022
Tel.: (212) 687-1980
Fax: (212) 687-7715
hnam@kaplanfox.com
rkaplan@kaplanfox.com
ffox@kaplanfox.com
dhall@kaplanfox.com
aschwartz@kaplanfox.com

MOTION FOR LEAVE TO AMEND

KOREIN TILLERY, LLC

George A. Zelcs (*pro hac vice*)
 Robert E. Litan (*pro hac vice*)
 Randall Ewing, Jr. (*pro hac vice*)
 205 North Michigan, Suite 1950
 Chicago, IL 60601
 Telephone: (312) 641-9750
 Facsimile: (312) 641-9751
 gzelcs@koreintillery.com
 rlitan@koreintillery.com
 rewing@koreintillery.com

Stephen M. Tillery (*pro hac vice*)
 Michael E. Klenov (SBN 277028)
 Carol O'Keefe (*pro hac vice*)
 505 North 7th Street, Suite 3600
 St. Louis, MO 63101
 Telephone: (314) 241-4844
 Facsimile: (314) 241-3525
 stillery@koreintillery.com
 mklenov@koreintillery.com
 cokeefe@koreintillery.com

COTCHETT, PITRE & MCCARTHY, LLP

Nanci E. Nishimura (SBN 152621)
 Adam J. Zapala (SBN 245748)
 Elizabeth T. Castillo (SBN 280502)
 Tamarah P. Prevost (SBN 313422)
 Noorjahan Rahman (SBN 330572)
 San Francisco Airport Office Center
 840 Malcolm Road, Suite 200
 Burlingame, CA 94010
 Telephone: (650) 697-6000
 Facsimile: (650) 697-0577
 nnishimura@cpmlegal.com
 azapala@cpmlegal.com
 ecastillo@cpmlegal.com
 tprevost@cpmlegal.com
 nrahman@cpmlegal.com

KAPLAN FOX & KILSHEIMER LLP

Laurence D. King (SBN 206423)
 Kathleen A. Herkenhoff (SBN 168562)
 1999 Harrison Street, Suite 1560
 Oakland, CA 94612
 Telephone: 415-772-4700
 Facsimile: 415-772-4707
 lking@kaplanfox.com
 kherkenhoff@kaplanfox.com

PRITZKER LEVINE, LLP

Elizabeth C. Pritzker (SBN 146267)
 Bethany Caracuzzo (SBN 190687)
 Caroline Corbitt (SBN 305492)
 1900 Powell Street, Suite 450
 Emeryville, CA 94608
 Telephone: (415) 805-8532
 Facsimile: (415) 366-6110
 ecp@pritzkerlevine.com
 bc@pritzkerlevine.com
 ccc@pritzkerlevine.com

MILBERG PHILLIPS GROSSMAN LLP

Peggy J. Wedgworth (*pro hac vice*)
 Robert A. Wallner (*pro hac vice*)
 Elizabeth McKenna (*pro hac vice*)
 Blake Yagman (*pro hac vice*)
 Michael Acciavatti (*pro hac vice*)
 One Penn Plaza, Suite 1920
 New York, New York 10119
 Telephone: 212-594-5300
 Facsimile: 212-868-1229
 pwedgworth@milberg.com
 rwallner@milberg.com
 emckenna@milberg.com
 byagman@milberg.com
 macciavatti@milberg.com

Counsel for the Proposed Class

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RELIEF REQUESTED

Pursuant to Federal Rules of Civil Procedure 15(a)(2) and 21, Consumer Plaintiffs seek leave to add Alex Iwamoto and Leigh Silver as plaintiffs and putative class representatives, and to update certain allegations concerning the relevant markets in Consumer Plaintiffs' Second Amended Class Action Complaint.

ISSUE PRESENTED

Whether this Court should permit Consumer Plaintiffs to add Alex Iwamoto and Leigh Silver as plaintiffs and putative class representatives, and to update certain allegations concerning the relevant markets, when this minor amendment will not prejudice any party and does not result from undue delay, bad faith, pleading inadequacies, or futile intentions.

MEMORANDUM OF POINTS AND AUTHORITIES**I. INTRODUCTION**

Pursuant to Federal Rule of Civil Procedure 15(a)(2) and/or Rule 21, Consumer Plaintiffs should be granted leave to name two additional plaintiffs, Alex Iwamoto and Leigh Silver (collectively "Proposed Plaintiffs"), and to update certain allegations concerning the relevant markets, in their Second Amended Class Action Complaint ("Second Amended Complaint").¹

No party would be prejudiced by this amendment. The Proposed Plaintiffs' claims, and the additional allegations concerning the relevant markets, are substantively identical to those asserted by consumers and other parties since the inception of this litigation. Moreover, procedurally, discovery remains ongoing; depositions are only just beginning, and experts have not been disclosed. Class certification briefing, dispositive motions, and trial are all several weeks to many months away, giving Defendants more than enough time to conduct any necessary investigation.

¹ The Second Amended Complaint contains material that that the Court previously ordered to remain under seal in the First Amended Complaint. (MDL Dkt. 89.) Accordingly, Consumer Plaintiffs file an administrative motion to seal concurrent with this motion. The proposed Second Amended Complaint is attached to the motion to seal as Exhibit 1 (redacted) and Exhibit 2 (unredacted). A redline of the changes from the First Amended Complaint to the proposed Second Amended Complaint is attached to the motion to seal as Exhibit 3 (redacted) and Exhibit 4 (unredacted).

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1 There is no evidence the requested amendment is unduly delayed, motivated by bad faith, required
 2 to remedy pleading inadequacies or futile. Indeed, the Scheduling Order entered by this Court set
 3 the deadline for adding parties and amending pleadings as December 3, 2021. (MDL Dkt. 122.)
 4 Moreover, Rule 15(a)(2) pronounces that leave to amend should be freely given when justice so
 5 requires, while Rule 21 permits the addition of parties on just terms. Under these circumstances,
 6 either Rule justifies an order permitting Consumer Plaintiffs to add the Proposed Plaintiffs to the
 7 Second Amended Complaint, as well as to update allegations concerning the relevant markets.²

8 **II. FACTUAL AND PROCEDURAL BACKGROUND**

9 Consumer Plaintiffs filed their Consolidated Consumer Class Action Complaint
 10 (“Consolidated Complaint”) on December 28, 2020. (Dkt. 132).³ The Consolidated Complaint
 11 alleged that Defendants violated the Sherman Act and California Cartwright Act, and named six
 12 plaintiffs, all of whom “purchased one or more apps through the Google Play Store” and/or
 13 “purchased in-app digital content through one or more apps offered in the Google Play Store from
 14 August 16, 2016, to the present and paid Google directly for these purchases.” (*Id.* at ¶¶16-21).

15 As discovery progressed, Consumer Plaintiffs decided to dismiss the claims filed by three
 16 of the original named plaintiffs—Kondomar Herrera, Francis MacAulay and Paul Kerivan. To that
 17 end, Consumer Plaintiffs and Defendants negotiated a stipulated dismissal without prejudice for
 18 those individuals, which the Court entered on July 27, 2021. (Dkt. 186). Around the same time,
 19 Consumer Plaintiffs filed their First Amended Complaint, which added two plaintiffs as named
 20 plaintiffs and putative class representatives. (Dkt. 185-3 at ¶¶26-27). The First Amended
 21

23 ² The proposed Second Amended Complaint also adds one factual allegation regarding a change
 24 Google made to its take rates for in-app purchases of subscriptions on October 21, 2021. The
 25 parties have already negotiated discovery concerning Google’s announcement, and the addition
 26 will cause no prejudice to Google.

27 ³ Unless otherwise indicated, all citations to the record refer to the docket in *In re Google Play*
 28 *Consumer Antitrust Litigation*, case number 3:20-CV-05761-JD.

1 Complaint alleged that Defendants unlawfully monopolize the android application distribution
2 market and the in-app aftermarket. (*Id.*)

3 On October 22, 2021, the Court entered the MDL Scheduling Order after considering the
4 parties' Joint Statement re: Case Schedule. (MDL Dkt. 122). The MDL Scheduling Order provides
5 that December 3, 2021 is the deadline for adding parties and amending pleadings. (*Id.*)

6 Consumer Plaintiffs now seek leave pursuant to Rules 15 and/or 21 to add the Proposed
7 Plaintiffs as named plaintiffs and putative class representatives in this lawsuit, and to update certain
8 allegations concerning the relevant markets.

9 **III. ARGUMENT AND AUTHORITY**

10 **A. Leave to Add the Proposed Plaintiffs and Update the Relevant Markets Should** 11 **be Granted Pursuant to Rule 15(a)(2).**

12 A liberal standard governs a party's right to amend. Rule 15(a)(2) instructs that courts
13 "should freely give leave when justice so requires." Fed. R. Civ. P. 15(a)(2) (2021). "In *Foman v.*
14 *Davis*, 371 U.S. 178, 182 (1962), the Supreme Court declared that the requirement of Rule 15(a)
15 that leave to amend shall be freely given when justice so requires 'is to be heeded' [and the] Ninth
16 Circuit has directed district courts to apply the rule favoring amendments to pleadings with
17 'extreme liberality.'" *Whelan v. Miles Indus.*, No. C-11-02146 EDL, 2012 WL 12920688, at *3
18 (N.D. Cal. Sept. 12, 2012) (*quoting DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 186 (9th Cir.
19 1987)).

20 Courts consider five factors when evaluating a motion for leave to amend: (1) whether the
21 movant unduly delayed in bringing the motion; (2) evidence of bad faith or dilatory motive by the
22 movant; (3) a movant's repeated failure to cure deficiencies by previous amendments; (4) prejudice
23 to the opposing party; and (5) futility of the amendment. *Griggs v. Pace Am. Grp. Inc.*, 170 F.3d
24 877, 880 (9th Cir. 1999). The "predominating factor is the resulting prejudice to the opposing
25 party." *Braun v. Norton*, No. C-05-03777-MJJ, 2006 WL 8459605, at *2 (N.D. Cal. Jan. 27, 2006).
26 *See also Yucesoy v. Uber Techs., Inc.*, No. C-15-0262 EMC, 2015 WL 4571547, at *2 (N.D. Cal.
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July 28, 2015) (“the crucial factor is the resulting prejudice to the opposing party.” (internal quotations omitted)); *Whelan*, 2012 WL 12920688, at *3 (“prejudice is the critical factor in considering motions for leave to amend.”) “Absent prejudice, or a strong showing of any of the remaining [] factors, there exists a *presumption* under Rule 15(a) in favor of granting leave to amend.” *Braun*, 2006 WL 8459605, at *2 (quoting *Eminence Cap., LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003)) (emphasis in original). *See also Bradley v. T-Mobile US, Inc.*, No. 17-cv-07232-BLF, 2019 WL 2358972 at *2 (N.D. Cal. June 4, 2019) (same).

1. No party would be prejudiced by amendment.

Adding the Proposed Plaintiffs and updating the relevant markets would not prejudice any party. Discovery is ongoing. Depositions have only just begun, with the first one having occurred on December 2, 2021. No expert reports or opinions have been disclosed. Briefing on class certification is still weeks away while the deadlines for dispositive and *Daubert* motions, as well as trial, are still months away. The Proposed Plaintiffs were already members of the putative class and the updated allegations concerning the relevant markets do not change the theories of the case and/or have been alleged by other plaintiffs in this MDL. Under such circumstances, Defendants cannot seriously contend they are prejudiced by Consumer Plaintiffs’ proposed amendment. *See, e.g., Bradley*, 2019 WL 2358972 at *2-3 (additional plaintiff permitted because “Defendants have more than adequate time to brief and argue a motion to dismiss [and] to conduct further discovery, if necessary.”); *McConnell v. Red Robin Int’l, Inc.*, No. C 11-03026 (WHA), 2012 WL 1357616, at *2-3 (N.D. Cal. Apr. 17, 2012) (no prejudice where proposed plaintiff was already a class member); *Whelan*, 2012 WL 12920688 at *3-4 (permitting new named plaintiffs because, among other reasons, limited discovery required was not prejudicial).

Further, the Proposed Plaintiffs’ circumstances and claims are essentially identical to those of the existing plaintiffs and putative class members. (*See* Dkt. 185-3 at ¶¶ 23-29). More to the point, adding the Proposed Plaintiffs and adjusting the relevant markets will neither expand the scope of the Consumer Plaintiffs’ claims nor change core legal theories. As *Braun* recognized, the

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1 “undue prejudice which a court must guard against is that prejudice which would cause a party
2 undue difficulty in prosecuting a lawsuit as a result of a change of tactics or theories on the part of
3 the other party.” *Braun*, 2006 WL 8459605, at *4 (internal quotations omitted). *See also In re*
4 *Facebook Priv. Litig.*, No. 10-cv-02389 (RMW), 2015 WL 2453734, at *5 (N.D. Cal. May 22,
5 2015) (no prejudice when additional plaintiffs are “not seeking new categories of avenues of
6 discovery.”) No such difficulties exist here. This total lack of prejudice strongly favors adding the
7 Proposed Plaintiffs.

8 **2. Rule 15(a)(2)’s remaining factors also support amendment.**

9 The additional factors relevant to Rule 15(a)(2) also favor leave to amend. Consumer
10 Plaintiffs did not delay in seeking this amendment. *Griggs*, 170 F.3d at 880. The schedule entered
11 by this Court contemplated the deadline to add parties and amend pleadings would be December
12 3, 2021. Defendants have adequate time to investigate the Proposed Plaintiffs and prepare for trial.
13 The revised allegations concerning the relevant markets will not prejudice Google because
14 similarly defined worldwide markets are alleged in the operative complaints of other plaintiffs in
15 this multi-district litigation. This lack of prejudice trumps any minor inconvenience allegedly
16 caused by amendment. *See Kormylo v. Forever Resorts, LLC*, No. 13cv511 JM (WVG), 2015 WL
17 5944064, at *6 (S.D. Cal. Oct. 13, 2015) (allowing amendment where delay did not prejudice
18 defendants).

19 There is also no evidence that Consumer Plaintiffs are acting in bad faith or with a dilatory
20 motive. *Griggs*, 170 F.3d at 880. The addition of the Proposed Plaintiffs and updated market
21 definition have no meaningful effect on the scope, timing or substance of this litigation. Therefore,
22 this factor also supports leave to amend.

23 Finally, Consumer Plaintiffs’ proposed amendment is not the result of failure or futility.
24 *Griggs*, 170 F.3d at 880. Plaintiffs named in the Consumer Plaintiffs’ prior filings—be they
25 plaintiffs’ original, individual complaints or the consumers’ consolidated pleadings—were
26 appropriate plaintiffs and putative class representatives and Defendants never suggested otherwise.
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1 The addition of the Proposed Plaintiffs is not, therefore, required to cure a repeated, prior
2 deficiency. Similarly, adding the Proposed Plaintiffs is not futile. Alex Iwamoto and Leigh Silver
3 are proper plaintiffs because they “made one or more purchases of in-app digital content through
4 one or more apps offered in the Google Play Store from August 16, 2016 to the present and paid
5 Google directly for [those] purchases.” (Dkt. 185-3 at ¶¶ 26-27). There is nothing unique about the
6 Proposed Plaintiffs that would render their claims futile.

7 In summary, all factor courts consider under a Rule 15(a)(2) analysis supports adding the
8 Proposed Plaintiffs to the First Amended Complaint.

9 **B. The Proposed Plaintiffs Should be Added Pursuant to Rule 21.**

10 Alternatively, as it relates to the addition of the Proposed Plaintiffs, Rule 21 “allows parties
11 to amend their pleadings by adding new parties but only with leave of court.” *Harper*, 2005 WL
12 8173082, at *2. Rule 21 provides: “On motion or on its own, the court may at any time, on just
13 terms, add or drop a party.” Fed. R. Civ. P. 21 (2021). For the same reasons amendment is
14 appropriate under Rule 15(a), “just terms” exist to add the Proposed Plaintiffs. No party would be
15 prejudiced by the amendment. The Proposed Plaintiffs’ claims are essentially identical to those
16 alleged by consumers since this litigation began and, as such, naming them putative class
17 representatives would not expand the breadth or complexity of this case. The amendment will have
18 no discernable impact on the timing or progression of this lawsuit, particularly considering
19 discovery is ongoing, depositions have only just begun, no significant motion practice has
20 occurred, and trial is not scheduled until fall 2022. Defendants cannot plausibly assert any reason
21 why they would be harmed if the Proposed Plaintiffs were added. For these reasons, the Court
22 should exercise its discretion under Rule 21 and add the Proposed Plaintiffs as plaintiffs and
23 putative class representatives in this lawsuit.

24 **IV. CONCLUSION**

25 Based on the foregoing, the Court should enter an order pursuant to Rule 15(a)(2)
26 permitting Consumer Plaintiffs to amend their Complaint to add the Proposed Plaintiffs as named
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1 plaintiffs and putative class representatives and to and to update certain allegations concerning the
2 relevant markets. In the alternative, the Court may also enter an order pursuant to Rule 21 adding
3 the Proposed Plaintiffs to this lawsuit.
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MOTION FOR LEAVE TO AMEND

Respectfully submitted,

By: /s/ Karma M. Giulianelli

BARTLIT BECK LLP

Karma M. Giulianelli (SBN 184175)
 Glen E. Summers (SBN 176402)
 Jameson R. Jones (*pro hac vice*)
 1801 Wewatta St., Suite 1200
 Denver, CO 80202
 Telephone: (303) 592-3100
 Facsimile: (303) 592-3140
 karma.giulianelli@bartlitbeck.com
 glen.summers@bartlitbeck.com
 jameson.jones@bartlitbeck.com

John Byars (*pro hac vice*)
 Lee Mason (*pro hac vice*)
 54 W. Hubbard St., Suite 300
 Chicago, IL 60654
 Telephone: (312) 494-4400
 Facsimile: (312) 494-4440
 john.byars@bartlitbeck.com
 lee.mason@bartlitbeck.com

KOREIN TILLERY, LLC

George A. Zelcs (*pro hac vice*)
 Robert E. Litan (*pro hac vice*)
 Randall Ewing, Jr. (*pro hac vice*)
 205 North Michigan, Suite 1950
 Chicago, IL 60601
 Telephone: (312) 641-9750
 Facsimile: (312) 641-9751
 gzelcs@koreintillery.com
 rlitan@koreintillery.com
 rewing@koreintillery.com

Stephen M. Tillery (*pro hac vice*)
 Michael E. Klenov (SBN 277028)
 Carol O'Keefe (*pro hac vice*)
 505 North 7th Street, Suite 3600
 St. Louis, MO 63101
 Telephone: (314) 241-4844
 Facsimile: (314) 241-3525
 stillery@koreintillery.com
 mklenov@koreintillery.com
 cokeefe@koreintillery.com

By: /s/ Hae Sung Nam

KAPLAN FOX & KILSHEIMER LLP

Hae Sung Nam (*pro hac vice*)
 Robert N. Kaplan (*pro hac vice*)
 Frederic S. Fox (*pro hac vice*)
 Donald R. Hall (*pro hac vice*)
 Aaron L. Schwartz (*pro hac vice*)
 850 Third Avenue
 New York, NY 10022
 Tel.: (212) 687-1980
 Fax: (212) 687-7715
 hnam@kaplanfox.com
 rkaplan@kaplanfox.com
 ffox@kaplanfox.com
 dhall@kaplanfox.com
 aschwartz@kaplanfox.com

KAPLAN FOX & KILSHEIMER LLP

Laurence D. King (SBN 206423)
 Kathleen A. Herkenhoff (SBN 168562)
 1999 Harrison Street, Suite 1560
 Oakland, CA 94612
 Telephone: 415-772-4700
 Facsimile: 415-772-4707
 lking@kaplanfox.com
 kherkenhoff@kaplanfox.com

PRITZKER LEVINE, LLP

Elizabeth C. Pritzker (SBN 146267)
 Bethany Caracuzzo (SBN 190687)
 Caroline Corbitt (SBN 305492)
 1900 Powell Street, Suite 450
 Emeryville, CA 94608
 Telephone: (415) 805-8532
 Facsimile: (415) 366-6110
 ecp@pritzkerlevine.com
 bc@pritzkerlevine.com
 ccc@pritzkerlevine.com

**COTCHETT, PITRE & MCCARTHY,
LLP**

Nanci E. Nishimura (SBN 152621)
Adam J. Zapala (SBN 245748)
Elizabeth T. Castillo (SBN 280502)
Tamarah P. Prevost (SBN 313422)
Noorjahan Rahman (SBN 330572)
San Francisco Airport Office Center
840 Malcolm Road, Suite 200
Burlingame, CA 94010
Telephone: (650) 697-6000
Facsimile: (650) 697-0577
nnishimura@cpmlegal.com
azapala@cpmlegal.com
ecastillo@cpmlegal.com
tprevost@cpmlegal.com
nrahman@cpmlegal.com

MILBERG PHILLIPS GROSSMAN LLP

Peggy J. Wedgworth (*pro hac vice*)
Robert A. Wallner (*pro hac vice*)
Elizabeth McKenna (*pro hac vice*)
Blake Yagman (*pro hac vice*)
Michael Acciavatti (*pro hac vice*)
One Penn Plaza, Suite 1920
New York, New York 10119
Telephone: 212-594-5300
Facsimile: 212-868-1229
pwedgworth@milberg.com
rwallner@milberg.com
emckenna@milberg.com
byagman@milberg.com
macciavatti@milberg.com

Counsel for the Proposed Class

CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing was served on December 3, 2021 upon all counsel of record via the Court's electronic notification system.

/s/ Karma M. Giulianelli